No. 78-158

In the Supreme Court of the United States

OCTOBER TERM, 1978

ALLAN J. BESBRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 576 F.2d 1350.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. A petition for rehearing was denied on June 7, 1978. The petition for a writ of certiorari was filed on July 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge conducted an adequate *voir dire* examination of prospective jurors to ascertain whether they had been influenced by pre-trial publicity concerning land fraud in general.

2. Whether there was a variance between the fraudulent scheme charged in the indictment and that proved at trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of fifteen counts of mail fraud, in violation of 18 U.S.C. 1341, and of two counts of interstate transportation of fraudulently obtained property, in violation of 18 U.S.C. 2314.[1] He was sentenced to concurrent five year terms of imprisonment and was fined $300 on each count. The court of appeals affirmed (Pet. App.).

The facts are summarized in the opinion of the court of appeals (Pet. App. 2-7). The evidence showed that in 1966 co-defendant Jacob Hood[2] founded Western Land Sales (WLS), which sold real

[1] Petitioner was tried together with co-defendants Henry McDonald, Marcus Baumann, Hayes Stewart, and Robert Crowell on a 54-count indictment (Pet. 16). McDonald, Baumann, and Stewart were each convicted on numerous counts, and their convictions were affirmed by the court of appeals. Co-defendant Stewart's petiiton for a writ of certiorari is pending in this Court (No. 77-1720).

[2] Hood pleaded guilty to four counts of the indictment and testified as a government witness at trial.

estate on a commission basis for various Arizona landowners. WLS entered into installment sales contracts with purchasers, and retained title to the land sold with the purchase money was paid in full (Pet. App. 32).

In 1969 and 1970, WLS entered into agreements with Bankers Finance and Holding Company (Banker's) and McDonald Investment Company (MIC) by which Bankers and MIC sold WLS's land sale contracts to investors. In the Winter of 1970-1971, WLS, finding itself in financial difficulty, began to sell, through Bankers and MIC, fraudulent land sale contracts in the names of buyers who never intended to make payments on the purchase price.[3] To conceal the fraud, WLS periodically sent to investors payments on the fraudulent contracts purportedly made by the purchasers (Pet. App. 4).

Late in 1971, the Securities and Exchange Commission (SEC) began to investigate the WLS sale of these contracts, and thereafter WLS agreed to cease the interstate sale of the contracts. In mid-1972, WLS sought to avoid SEC registration by selling corporate promissory notes secured by mortgages on lots with cabins. Few of the lots had cabins, however, and Hood falsified appraisals of the lots to reflect the existence of cabins. Moreover, many lots were assigned more than once. In 1973, WLS defaulted on its obligation. Few of the note holders

[3] These sham buyers, some of whom were paid $50 for their signatures, were assured that they were not expected to make payments (Pet. App. 32).

were able to obtain their lots and those who could found no cabins on them (Pet. App. 5-6).

Petitioner served as corporate secretary and counsel for WLS between November 1971, and June 1972 (Pet. App. 32-33). As part of his duties, he researched WLS lot purchases records to determine the number of lots which were to be released for sale (Tr. 1852). He thus became aware that many of WLS's land sale contracts were not made with bona fide purchasers. Using this knowledge, petitioner was instrumental in arranging for several investors to make large purchases of fraudulent contracts (Tr. 1861-1863).[4]

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the trial judge failed to conduct an adequate *voir dire* examination of prospective jurors to ascertain whether they had been influenced by press coverage of Arizona land fraud schemes in general. The court of appeals properly found this contention to be without merit

[4] At trial, petitioner admitted to having known that WLS was financially supporting contracts and that he transmitted letters and checks amounting to a thousand dollars each to Central Service Bureau, although he claimed that he thought this money came from the sale of land and felt he owed no obligation to notify investors that WLS was making the payments rather than the lot purchasers (Tr. 1907-1908). Petitioner further admitted that he caused to be prepared in final form an agreement for sale of a particular lot (Gov't. Exhs. 55 and 56) and an investment letter reflecting the terms of this contract for the sale of the lot (Tr. 1912-1914). He also admitted that he knew that land sales contracts were being used as collateral for loans to WLS (Tr. 1924).

and we invoke its careful opinion on this point (Pet. App. 7-12).

As petitioner concedes (Pet. 10) he was mentioned in but one article, which "certainly does not, by itself, constitute massive pre-trial publicity." At *voir dire*, the trial judge read the indictment to the veniremen who were instructed to indicate any acquaintance with the facts of the case or the names mentioned (X Tr. 126). Those who so indicated were examined individually by the court (see X Tr. 146, 159-161).[5] The court then inquired as follows (X Tr. 161-163):

> THE COURT: What I am going to ask you next is this. We do know—most of us—that the media—newspapers, TV and television—have carried stories about alleged fraudulent activities by persons associated with land development companies. Of course the charges are read to you, which of course are no evidence whatsoever of the guilt of anybody, as I told you earlier, allegations of that kind. Now by reason of the stories and so forth that have appeared previously, is there any reason that any of you know of why you couldn't fairly and impartially sit in this case and find the facts according to the evidence presented to you and the instructions on the law given to you by the Court?
>
> (No response).
>
> THE COURT: Are there any of you so prejudiced one way or the other that you could not

[5] Significantly, none of the jurors who were examined individually indicated any bias arising from exposure to the publicity of which petitioner complains.

be fair and impartial in this case? The reason I particularly ask you that is that in every trial everybody in a civil or criminal case is entitled to be tried solely and wholly on the basis of evidence presented to them here in Court, and the facts are not to come from any other place or any other source, and any opinion you form should be based upon the facts presented to you here in Court and should not be derived from anywhere else. That is one of the big problems we have nowadays with the press. The press seems to believe sometimes that there is only one Constitutional Amendment involved and that is free press, which is a sacred and honorable one, but there is also another called a fair trial which is equally sacred and honorable and they forget there are two of them, it seems. For that reason it is important that you are in such a frame of mind that you fairly and impartially try this case based on the evidence you hear here and not on opinions derived from somewhere else. So I reemphasize that. If any of you have any problems with that, let us know. Otherwise we will go ahead. Does anybody have any problems with that, what I have just stated?

(No response).

The trial judge is vested with broad discretion in determining the proper scope and extent of *voir dire* examination. *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976). In light of the general nature of the publicity involved in this case, the examination conducted by the court was adequate to ensure that petitioner would receive a fair trial, and the court's determination that a more extensive examination of individual jurors was

not necessary was certainly not an abuse of discretion.[6] See *United States* v. *Polizzi*, 500 F.2d 856, 879 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

2. The indictment in this case charged as the basis for each count that petitioner and his co-defendants engaged in a single scheme, set forth in full in Count 1, to defraud and to obtain money by false representations. Petitioner contends (Pet. 15-23) that the proof at trial showed the existence of four separate schemes to defraud and therefore varied from the charges against him.

The evidence established a single scheme to obtain money through the fraudulent operation of WLS's land sales business. Petitioner argues, however, that his conduct should be separated from the land sale contract transactions involving Bankers and MIC occurring before petitioner was employed by WLS, as well as from the promissory note sales which occurred after he had left WLS. The flaw in this contention is that all of these fraudulent activities were but steps in an ongoing effort to keep WLS out of financial difficulty. The cessation of the sale of land sale contracts and the initiation of the sale of secured promissory notes in 1972 did not mark the end of one scheme and the beginning of another; they were

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[6] Petitioner's reliance on *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), is misplaced. In *Sheppard*, *supra*, 384 U.S. at 345, it was clear that the jurors had been constantly exposed to extensive news media coverage of the very crime for which the defendant was to be tried. In the instant case, the *voir dire* determined that the jurors did not know the particulars of the case, nor did they know of petitioner's involvement in land sale fraud.

no more than a change in tactics made necessary to avoid difficulties with the SEC.

As the court of appeals observed (Pet. App. 16), "the defendants entered and left the operation at different times," and petitioner became involved in the scheme after it began and left WLS before the scheme ended. It was not necessary to show that each defendant was involved in all aspects of the scheme. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 556-558 (1947). By virtue of his position as a corporate officer, petitioner was well aware of the general scope of WLS's continuing efforts to defraud, and he knowingly participated in those efforts by arranging for the sale of fraudulent land sale contracts. He was therefore a participant in the overall scheme charged in the indictment.[7] Moreover, since the evidence supported the existence of a single fraudulent scheme, of which petitioner was a part, the

[7] Even if the evidence had showed more than one scheme to defraud, the variance would not entitle petitioner to relief unless it was prejudicial. *Berger* v. *United States*, 295 U.S. 78 (1935). There was clearly no prejudice here. Assuming that there were multiple schemes, they were nonetheless parts of "the same series of acts or transactions" (Fed. R. Crim. P. 8(b)) and as such could have been joined for trial. A severance would not have been required since the joinder would not have been prejudicial. See Fed. R. Crim. P. 14. The case, involving five defendants, was not so complex as to render it difficult for the jurors to compartmentalize the evidence against each defendant. Thus *Kotteakos* v. *United States*, 328 U.S. 350 (1946), upon which petitioner relies, is clearly distinguishable. In *Kotteakos*, evidence showed eight separate conspiracies involving thirty-two conspirators, thirteen of whom remained in the case when it was submitted to the jury.

district court did not err in refusing to charge the jury that it could find that there were multiple schemes to defraud. Cf. *United States* v. *Braverman*, 522 F.2d 218, 223 (7th Cir. 1975); *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973).[8]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[8] At the close of petitioner's case, counsel informed the court that he was unable to formulate a proposed jury instruction regarding whether the evidence proved one or multiple schemes, notwithstanding the court's receptiveness to such an instruction (XII Tr. 2712-2713). Thereafter, petitioner neither submitted such an instruction nor objected to the charge on the ground that it did not include such an instruction. In these circumstances petitioner should not now be heard to complain of the failure of the trial judge to give such an instruction.

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